Supreme Court, U.S.
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NO. 91-149

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CLARENCE H. HOLDING, Individually, and d/b/a CLARENCE H. HOLDING AND COMPANY,
Petitioner,

v.

STATE CORPORATION COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was Petitioner deprived of the due process of law guaranteed by the fourteenth amendment of the United States Constitution when the Supreme Court of Virginia dismissed Petitioner's appeal of right for his failure to comply with a mandatory rule of the Virginia Court?

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OPINION BELOW

The January 31, 1991, order dismissing Petitioner's appeal is not (and will not be) reported. The text of the order is set forth on pages A-1 - A-2 of the Appendix attached hereto.

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV, § 1 of the Constitution of the United States of America:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 19, 1989, the State Corporation Commission[1] ("Commission" or "SCC"), pursuant to Va. Code § 13.1-519 (1989), issued a ninety-day temporary injunction against Petitioner, individually, and doing business as Clarence H. Holding and Company, enjoining him from violating the broker-dealer and agent registration provisions and the anti-fraud provisions of the Virginia Securities Act (Va. Code §§ 13.1-501 - 13.1-527.3 (1989 & Supp. 1991)) (further references to sections of the Securities

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[1]Petitioner has designated Respondent as "Securities Division, SCC of Virginia." It is submitted that the appropriate Respondent is the "State Corporation Commission," a constitutionally created department of government of the Commonwealth of Virginia. Va. Const. art. IX.

Act will exclude the phrase "Va. Code").[2] The temporary injunction was entered at the request of the SCC's Division of Securities and Retail Franchising ("Division"), which filed a motion for such relief, and mailed a copy thereof to Petitioner, on September 8, 1989. The factual basis in support of the motion was provided in the affidavit of John W. Parthum, a Senior Securities Investigator in the Division, which was appended to the motion. Holding failed to appear at the September 19 hearing on the motion, but filed on September 20 a single document that responded to the motion and moved "to dismiss the motion for temporary injunction." The motion to dismiss was

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[2]The broker-dealer and agent registration requirements are contained in § 13.1-504 A (Supp. 1991). The anti-fraud provisions are set forth in § 13.1-502 (1989).

denied by order of October 11, 1989. On a subsequent motion of the Division, and after a hearing at which Petitioner represented himself, the injunction was extended until April 18, 1990, by order dated December 15, 1989.[3]

On October 10, 1989, Petitioner submitted a request that he be given copies of all documents and information in the possession of the Commission pertaining to the Division's investigation of his activities. By letter dated October 19, staff counsel advised Petitioner that he would have an opportunity to review the nonprivileged part of the Division's file if,

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[3]At the conclusion of this hearing, the Commission "strongly" suggested to Holding that he consult with an attorney. Holding, however, continued to appear pro se throughout the course of the Commission proceedings and represented himself in his appeal to the Supreme Court of Virginia.

after completion of the investigation, a formal Commission proceeding seeking imposition of some type of permanent sanction against him was instituted.

On April 17, 1990, the Commission, pursuant to § 13.1-521 (Supp. 1991), instituted a civil proceeding against Holding, individually, and d/b/a Clarence H. Holding and Company, by the issuance of a Rule to Show Cause. The Rule continued in effect the temporary injunction and notified Petitioner of his alleged unlawful conduct; of the Division's intention to ask the Commission to make permanent the temporary injunction and to impose a monetary penalty; of the date, time and place of the scheduled hearing; of the deadline for the filing of a pleading in response to the Rule; and, of the fact that he would be deemed in default, and the consequences thereof, if he failed to

timely respond and/or appear at the scheduled hearing.

By order of May 22, 1990, the Commission granted Holding's motion for an extension of the filing and hearing dates. His second request for extension of these dates, filed on July 2, 1990, was granted as to the responsive pleading, but denied as to the hearing. On July 11, 1990, Petitioner filed a request for the names of, and other information about, the witnesses the Division intended to present at the hearing. This data was provided in the Division's "Response to Request for Names of Witnesses" filed on July 18. Petitioner's responsive pleading was filed on July 16,[4] and the case was heard by the Commission

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[4]In Holding's responsive pleading, he admitted that in fourteen transactions he sold securities as an unregistered broker-dealer and agent.

on July 31, 1990. The evidence received during the four hour hearing consisted of the testimony of four witnesses called by the Division (each of whom was cross-examined by Holding), the testimony of Petitioner (who testified on his own behalf), and twenty-two exhibits.

The Commission issued its Final Order and Judgment on August 9, 1990. Among other things, it found that Holding had violated § 13.1-502 (the anti-fraud provisions) in one transaction and § 13.1-504 (the requirements to be registered as a broker-dealer and an agent) in fourteen transactions. As a consequence, Petitioner, pursuant to § 13.1-519, was permanently enjoined from violating these statutory provisions and, pursuant to § 13.1-521, was penalized in the total amount of $500, $250 for having violated § 13.1-502 and $250 for having violated § 13.1-504.

In accordance with the Rules of Practice and Procedure of the SCC, Holding filed a Petition for Rehearing or Reconsideration on August 21, 1990. The relief was denied by order dated August 27, which stated "that the grounds set forth in the Petition in support of the relief requested are without merit[.]"

Petitioner exercised his right of appeal and timely filed a Notice of Appeal to the Virginia Supreme Court indicating that he was appealing from the Commission's orders of August 9 and 27, 1990.[5] On January 14, 1991, the SCC filed a motion to dismiss the appeal, in which

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[5]The Constitution and statutes of the Commonwealth provide that any party aggrieved by a final order or judgment of the Commission has an appeal of right to the Supreme Court of Virginia irrespective of the amount involved. Va. Const. art. IX, § 4; Va. Code § 12.1-39 (1989).

it asserted that Holding had violated the Virginia Court's rules by failing to timely file assignments of error, an appeal bond and his designation of the parts of the record to be included in the appendix. Citing its rule concerning the filing of assignments of error (Va. S. Ct. Rule 5:21(i); the text of this Rule is set out on pages A-3 - A-11 of the Appendix attached hereto), the Virginia Court dismissed the appeal by order dated January 31, 1991. Holding's request for a rehearing on the judgment dismissing the appeal was denied by the Court on April 19, 1991.

Other facts and assertions contained in the "Facts of the Case" portion of the petition (Pet. 4-8) require amplification, to wit:

The second full paragraph on page 5 declares that Mr. Parthum "by affidavit

falsely made allegations" concerning Holding. There is no evidence of record which supports this conclusion. To the contrary, the "allegations" that are being assailed were established by the evidence, as the Commission found in its Final Order and Judgment.

The paragraph beginning at the top of page 7 accuses Mr. Parthum and two other employees of the Division of being "co-conspirators in the false arrest and allegations" in connection with the Commonwealth's Attorney of Essex County, Virginia apparently having Holding arrested "for embezzlement of $10,000 from Madeline Watts." The transcript of the July 31 hearing contains testimony from Mrs. Watts about this incident. This is the only evidence of record pertaining to the embezzlement matter (a criminal matter

separate from and independent of the SCC proceeding), and it is devoid of any reference to the employees identified in the petition, to a conspiracy, or to the "false" arrest of Petitioner.

The text on page 8 refers to Holding's customers having "made handsome profits" and not having "lost any money" while a customer, to his flawless integrity, character, etc., and to his educational background. None of these areas was an issue in the proceeding below, and the record, including Petitioner's testimony, does not support any of these assertions. Also on page 8 is a reference to character "Affidavits of clients" being "in the file." No such documents were either offered or received in evidence. The Commission assumes the reference is to the two affidavits appended to Holding's Petition for Appeal filed with the Supreme Court of

Virginia in December 1990 and included in the Appendix he prepared and filed with that Court in January 1991. The Commission moved the Court to exclude from the Appendix these affidavits as well as twelve other documents which Holding designated for inclusion, but which were not part of the record developed before the Commission.

SUMMARY OF ARGUMENT

Holding's petition should be denied for the simple reason that it fails to meet the "special and important reasons" standard enunciated in Rule 10.1 of the Rules of this Court. Contrary to the statement of jurisdiction set forth on pages 1 and 2 of the petition, this matter does not involve (a) a decision, or any other action, by a United States court of appeals, (b) a decision on a federal question by the Supreme Court of Virginia that conflicts with a

decision rendered by another state court of last resort or a United States court of appeals, or (c) "an important question of federal law" that should be decided by this Court or that was decided below in a manner which conflicts with applicable law established by this Court. Petitioner has failed to cite or otherwise meaningfully identify any decision of any tribunal that is in conflict with the decisions rendered below. Holding's due process guarantees were fully vindicated below, and his petition raises no other federal question of any significance.

ARGUMENT

The only question properly before the Court is whether Petitioner was denied due process of law by the Virginia Supreme Court's dismissal of his appeal. By virtue of the dismissal, none of the other

questions raised by Holding about the Commission's procedures was reviewed by the Virginia Court. In any event, none of the arguments advanced by Petitioner about the Commission's procedures has any merit.

The procedures that governed Holding's appeal from the Commission's decision of August 9, 1990 are clear. Rule 5:21(i) of the Virginia Supreme Court provides, in relevant part, that an appellant shall file assignments of error "[w]ithin 10 days after the issuance by the clerk of this Court of his certificate [granting the appeal]. . . ." The time limit imposed by this Rule is mandatory, and failure to file within the prescribed time is grounds for dismissal of an appeal. Skeens v. Commonwealth, 192 Va. 200, 202-03, 64 S.E.2d 764 (1951); see also Towler v. Commonwealth, 216 Va. 533, 535, 221 S.E.2d 119 (1976) (dismissal is

the price of failure to comply with the Virginia Supreme Court's mandatory rules provisions).

This Court has long held that dismissal may be an appropriate sanction for failure to comply with reasonable procedural rules. In Thomas v. Arn, 474 U.S. 140, 155 (1985), the Court summarized the principle.

> We recently reiterated our long-standing maxim that 'the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule.' Logan v. Zimmerman Brush Co. 455 U.S. 422, 437, 71 L.Ed. 2d 265, 102 S.Ct. 1148 (1982). The same rationale applies to the forfeiture of an appeal. . . .

The 10-day rule is a reasonable requirement because the granting of an appeal from a final order of the SCC is required by Virginia law (see supra note 5). Thus, Petitioner could have prepared his assignments of error in

September 1990, soon after he submitted the Notice of Appeal, and filed them in December by mail (Va. S. Ct. Rule 5:5(b)).

Petitioner concedes that he did not file assignments of error within the time prescribed by the Virginia Supreme Court's rules (Pet. 9).[6] Therefore, dismissal of Holding's appeal was appropriate and not violative of due process.

As stated in the Commission's order of August 9, 1990, Holding was assessed two penalties of $250 each. One assessment was

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[6]Holding submits various excuses for his failure to file, including health and automobile breakdown. Similar excuses were used numerous times throughout the Commission proceedings and Petitioner states that his health problem has endured for 35 years (Pet. 4). Petitioner's excuses are not unique to the period within which assignments of error should have been filed and are unpersuasive for that reason.

for failure to register as a broker-dealer and agent under § 13.1-504, a violation he admits (Pet. 5). The other was for employing misleading statements in the sale of a security, a decision of the Commission based on the evidence of record after notice to Holding and an evidentiary hearing in which he participated. Petitioner was also enjoined from further violation of the law as authorized by § 13.1-519.[7] There is no question of federal law raised by any of these Commission decisions and Holding's

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[7]Holding was never enjoined from operating a business in Virginia; he was only enjoined to operate it according to law.

procedural rights under the Constitution were fully protected.[8]

In sum, the only issue before this Court is whether Holding's due process rights were abridged when the Virginia Supreme Court dismissed his appeal for failure to meet procedural requirements. Such rights were not denied, and dismissal by the Virginia Supreme Court was entirely proper.

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[8]Holding also argues that the structure of the Commission violates his due process because one agency possesses judicial, executive and legislative powers. The constitutionality of the SCC's structure was decided long ago. Winchester & Strausburg R.R. Co. v. Commonwealth, 106 Va. 264, 267-74, 55 S.E. 692 (1906). See Withrow v. Larkin, 421 U.S. 35, 56 (1975) (due process is not violated merely because the same members of an administrative agency are associated with the agency's investigative and adjudicative functions).

CONCLUSION

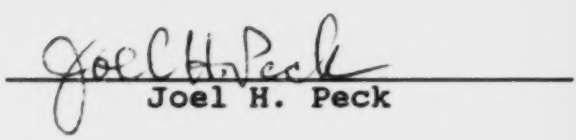
The Petition should be denied.

Respectfully submitted,

Joel H. Peck
Senior Counsel
(Counsel of Record)
Judith Williams Jagdmann
Assistant General Counsel

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 1991, three copies of the foregoing Brief in Opposition were mailed by first class mail, postage prepaid to Clarence H. Holding, Route 1, Box 2, Mount Pleasant Plantation, Hague, Virginia 22469.



Joel H. Peck

APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 31st day of January, 1991.

Clarence H. Holding, Individually and d/b/a Clarence H. Holding & Company, Appellant,

against Record No. 901632
S.C.C. Case No. SEC890180

Commonwealth of Virginia, ex rel. State Corporation Commission, Appellee.

Upon an appeal of right from orders entered by the State Corporation Commission on August 9 and August 27, 1990.

On January 14, 1991 came the appellee, by counsel, and filed a motion praying that the Court dismiss the appeal of right in this case.

Thereupon came the appellant, in proper person, and filed a response in opposition to said motion.

On consideration whereof, the motion to dismiss is granted, and it is ordered that the appeal of right heretofore awarded in this case be and the same hereby is dismissed. Rule 5:21(i).

This order shall be certified to the State Corporation Commission.

A Copy,

Teste:

/s/ David Beach

Clerk

F. SPECIAL RULES.

Rule 5:21. Special Rules Applicable to Appeals from the State Corporation Commission.

(a) Applicability. - This Rule applies to all appeals from the State Corporation Commission and supersedes all other Rules except as otherwise specified herein.

(b) Party. - For the purposes of this Rule, the Commission, the Attorney General, the applicant or petitioner, and every person who made an appearance in person in a capacity other than as a witness or by counsel at any hearing in any proceeding before the Commission shall be the parties to such proceeding. Upon the request of any party, the clerk of the Commission shall prepare and certify a list of all parties (including their

addresses and the names and addresses of their counsel) to a proceeding before the Commission. Initially, the parties to an appeal from an order in a proceeding shall be the parties to that proceeding, but the number of parties to an appeal may thereafter be limited as hereinafter provided. Service upon a party represented by counsel shall be made upon his counsel.

(c) Notice of Appeal. - No appeal from an order of the Commission shall be allowed unless, within 30 days after entry of the order appealed from, counsel files in the office of the clerk of the Commission a notice of appeal, a copy of which has been mailed or delivered to each party to the appeal and appended to which is either an acceptance of such service or a certificate showing the date of delivery

or mailing. All appeals from the same order shall be deemed to be a single consolidated case in this Court unless this Court shall order a severance for convenience of hearing.

(d) Record. - The clerk of the Commission shall prepare and certify the record as soon as possible after the notice of appeal is filed and shall, as soon as it has been certified by him, transmit it to the clerk of this Court within 4 months after entry of the order appealed from. In the event of multiple appeals in the same case or in cases tried together below, only one record need be prepared and transmitted.

(e) Contents of Record. - The record on appeal from the Commission shall consist of all notices of appeal, any application or petition, all orders

entered in the case by the Commission, the opinions, the transcript of any testimony received, and all exhibits accepted or rejected, together with such other material as may be certified by the clerk of the Commission to be a part of the record. The record shall conform as nearly as practicable to the requirements of Rule 5:10.

(f) Alignment of Parties. - Within 21 days after the notice of appeal shall have been filed in the office of the clerk of the Commission, each party who has not filed a notice of appeal and who intends to participate in the appeal shall file in the office of the clerk of the Commission and shall mail to every other party a notice that he intends to participate as an appellant or as an appellee. Every party who seeks reversal or modification

of the order appealed from shall be deemed an appellant, and every party who seeks affirmance of the order appealed from shall be deemed an appellee. Every party who does not file such a notice and every party who, having filed such a notice as an appellant, does not thereafter file a petition for appeal shall be deemed no longer to be a party to the appeal, and no further papers need be served on him. Notwithstanding the foregoing provisions, (1) a necessary party who does not file such a notice or petition for appeal shall be deemed an appellee, and (2) the Commission need not file such a notice and shall be deemed an appellee.

(g) Petition for Appeal. - The petition(s) for appeal shall be filed in the office of the clerk of this Court within 4 months after entry of the final

order, judgment or finding by the Commission. Each party deemed to be an appellant shall file a petition for appeal and shall, before the petition is filed, mail or deliver a copy to every other party to the appeal. Except as provided herein, the provisions of Rule 5:17 do not apply to a petition filed pursuant to this paragraph. The petition for appeal need only identify the order appealed from, with its date, contain a prayer that the appeal be granted, and include the certificate required by Rule 5:17(d)(1), (2) and (4). Oral argument on the petition shall not be allowed nor will a brief in opposition be received. If the petition prays for a suspension of the effectiveness of the order appealed from, it shall contain such statements of the facts and argument as shall be necessary

for an understanding of the question presented. In that event, a brief in opposition will be received and oral argument may be granted.

(h) Award of Appeal. - When the notice of appeal, the record, and the petition(s) for appeal appear to have been filed in the manner provided herein and within the time provided herein and by law, the clerk of this Court shall forthwith enter an order granting the appeal, requiring such bond as he shall deem proper. His action shall be subject to review by this Court.

(i) Assignments of Error. - Within 10 days after the issuance by the clerk of this Court of his certificate pursuant to Rule 5:23, each party appellant shall file assignments of error in the office of the clerk of this Court and mail a copy

thereof to every other party to the appeal. Only errors so assigned will be noticed by this Court and no error not so assigned will be admitted as the ground for reversal of the decision below. Error will not be sustained to any ruling by the Commission unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. An assignment of error which merely states that the judgment in contrary to the law and the evidence is not sufficient.

(j) Further Proceedings. - Further proceedings in this Court shall conform to Rules 5:23 through 5:40 provided that (i) the time within which the appellee may file with the clerk of this Court a designation of the additional parts of the

record that he wishes included in the appendix (Rule 5:32(d)) shall be extended to 30 days after the date of the certificate of the clerk of this Court pursuant to Rule 5:23 an appeal has been awarded; and (ii) the time within which the opening brief of the appellant shall be filed in the office of the clerk of this Court shall be extended to 50 days after such date.

(k) Additional Brief. - An appellant who seeks relief different from that sought by another appellant may file an answering brief at the time prescribed for filing the brief of appellee.